

UNDUE INFLUENCE AND DURESS IN ESTATE PLANNING

First Run Broadcast: April 26, 2019

Live Replay: September 16, 2019

1:00 p.m. ET/12:00 p.m. CT/11:00 a.m. MT/10:00 a.m. PT **(60 minutes)**

Elderly and other clients with diminished physical or intellectual capacity are often the victims of undue influence or duress in disposition of their property. They are often dependent on a caregiver, relative or other person for social interaction or essential mobility and functioning. This makes them ripe for exploitation by the unscrupulous. From a trust and estate planner's perspective, undue influence and duress undermine the client's true intent and jeopardize the validity of estate and trust instruments. This program will provide you with a world guide to spotting warning signs of undue influence and duress, drafting considerations, and the risks of litigation challenging trust and estate plans.

- Undue influence and duress risks in trust and estate planning
- Elements of undue influence – motive, opportunity and actual exercise
- Understanding what constitutes duress
- How to spot warning signs or red flags of undue influence and duress
- Drafting considerations to preserve the true intent of a client and prevent challenges
- Court battles – burdens of proof, assessing likelihood of successful challenges

Speakers:

Steven B. Malech is partner in the New York City office of Wiggin and Dana, LLP, where he is chair of the firm's probate litigation practice group. He represents beneficiaries, fiduciaries and creditors in disputes involving alleged violations of the Prudent Investor Act and its predecessors, alleged breaches of fiduciary duty, disputed accountings, and will contests. He represents clients in cutting edge probate litigation matters involving trusts and estates with assets in the hundreds of millions of dollars. Mr. Malech received his B.A., with special honors, from the University of Texas and his J.D. from the Connecticut School of Law.

Michael J. Kenny, Jr. is an attorney in the New York City office of Wiggin and Dana, LLP where he has an extensive litigation practice in the areas of probate and fiduciary disputes, commercial and construction law, and maritime law. He has extensive both challenging and defending wills and trusts. Mr. Kenny received his B.A. from the College of The Holy Cross and his J.D. from Fordham University School of Law.

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**Undue Influence & Duress in Estate Planning
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WIGGIN AND DANA

Undue Influence & Duress in Estate Planning

Steven B. Malech

Wiggin and Dana LLP – New York City

(o) (212) 551-2633

smalech@wiggin.com

Robert W. Benjamin

Wiggin and Dana, LLP – New York City

(o) (212) 551-2602

rbenjamin@wiggin.com

Overview

- Definition and Purpose of a Will
- Undue Influence Defined
 - Motive
 - Opportunity
 - Exercise
- Warning Signs or “Red Flags”
- Drafting Considerations
- Court Battles: Burdens of Proof

What is a Will?

- Written instrument* to take effect upon death;
- Directing disposition, retention of property;
- Appointing fiduciary or making other provision or administration of estate; and
- Is revocable during lifetime.

EPTL § 1-2.19

*With narrow exception for oral and handwritten wills

Whose Wishes?

- A will must be a true expression of the testator's wishes.
- If, instead, it reflects the desires of some person who controlled the testator's thoughts or actions, the will is invalid because of undue influence.

- To be “undue,” the influence exerted must amount to mental coercion that led the testator to carry out the wishes of another, instead of her own wishes, because the testator was unable to refuse or too weak to resist.

NY PJI 7:55

Elements

- Motive;
- Opportunity; and
- Actual exercise resulting in the decedent disposing of her property in a different manner than she otherwise would have

Case-by-Case Analysis

“It is impossible to define or describe with precision and exactness what is undue influence; what the quality and the extent of the power of one mind over another must be to make it undue, in the sense of the law, when exerted in making a will.”

Matter of Benbenek, No. 13/478/A
(N.Y. Sur Ct, Suffolk County July 31, 2014).

Motive

- Obtaining Money and/or Other Valuable Assets

“Proponent's modest financial situation, improved with funds from decedent (for a new car, landscaping work and other home improvements, at least), together with the apparent financial needs of proponent's daughter (also assisted with decedent's funds), gave proponent a motivation to unduly influence her mother.”

In re Johnson, 46 Misc. 3d 1213(A) (N.Y. Sur. 2015).

Does Nature of Relationship Matter?

- Display of gratitude, love, esteem, or friendship
- Inducing testamentary disposition of property

“[C]annot ordinarily be considered as arising from undue influence, and all these motives are allowed to have full scope, without in any way affecting validity of act.”

In re Will of Ryan, 34 A.D.3d 212, 824 N.Y.S.2d 20 (2006)

Opportunity

- Physical and Mental Condition
- Ability to Act Independently
- Isolation from Family and Close Friends
- Living with Proponent
- Holding Proponent in Position of Trust
- Willingness to Change Prior Plan(s)

Actual Exercise

An objectant must show that the acts of the influencing party are effectively making it his or her will and not the will of the decedent.

Influence must be exerted at the time of the instrument's execution.

Direct Evidence

- Self-Dealing
- Procurement of Will and/or Trust
- Retitling or Transfer of Assets

Circumstantial Evidence

Highly Probative Factors include:

Testator dying of cancer;

Proponent expressing impatience in connection with the execution of the will and the POA; and

Proponent moved money and accounts as soon as he could

In re Will of Baitschora, 700 S.E.2d 50 (N.C. Ct. App. 2010).

Impact of Confidential Relationship

- Use of circumstantial evidence
- Inference of undue influence
- Create a fact issue precluding summary judgment as a matter of law

What Constitutes a Confidential Relationship?

“For a relationship to be deemed confidential, the proof must show that the testator was dependent on the beneficiary and that the beneficiary intruded on the testator’s freedom of action.”

Matter of Frydman, 2010-2912, NYLJ 1202655385941, at *1 (N.Y. Sur. Ct., Westchester County May 1, 2014).

What is it not?

- Relationship with close family member
- Relationship with drug dealer

Unsubstantiated claim that proponent was decedent's drug dealer and that they did drugs together does not “establish a confidential relationship, let alone demonstrate that proponent exploited their relationship to coerce decedent to make his will.”

Red Flags: Potential Signs of Trouble

Potential Pitfalls for the Unwary

- New Client Leaving Prior Counsel
- Referral Source with an Interest in Estate
- Isolation/Separation from Family
- Bequests to Caregivers and Non-Family Members
- Presence of Interested Person(s) at Planning Meetings and/or Execution of Will
- Weakened Mental or Physical Condition

Relevant Facts and Circumstances

- Testator's Ability to:
 - Have Coherent Conversation;
 - Respond to Questions;
 - Conduct Business Affairs;
 - To Live on His/Her Own;
 - Participate in ADL; and
 - Understand English (or language of Will).

Relevant Facts and Circumstances

- Isolation of Testator from Natural Objects of Her Bounty.
- Involvement of Beneficiary, Person of Trust, or Proponent:
 - Selection of Attorney Draftsman;
 - Instructions to Attorney Draftsman;
 - Meetings with Attorney Draftsman; and
 - Execution Ceremony.
- Similarity to Prior Testamentary Plan(s).
- Threat or Existence of Physical Harm (Duress).

Other Relevant Facts and Circumstances

- Testator's Physical and Mental Condition
 - Frailty (old age, illness, etc.)
 - Mental Condition/Disorder (Alzheimer's, Dementia)
 - Use of Prescription Medication or Other Drugs
 - Treating v. Non-Treating Medical Experts

- Timing of Execution
 - Deathbed Instruments – Heightened Scrutiny

- Observations of Attesting Witnesses/Draftsperson

Practice Tips

- Inquire:
 - Family and Close Friendships
 - Nature and Extent of Assets
 - Medication Use
 - Medical Conditions
 - Current Events/Hobbies/Interests

- Observe:
 - Appearance
 - Speech
 - Awareness

- Listen:
 - Testator's Understanding of Key Provisions

Practice Tips

- Inquire:
 - Reason(s) for Appointment of Fiduciary
 - Reason(s) for Bequest(s)
 - Reason(s) for Other Instructions
 - Reason(s) for Selecting Attorney Draftsman

- Observe:
 - Physical and Mental Condition of Testator
 - Presence of Others
 - Role of Person(s) in Position of Trust

- Listen:
 - Who Provides Instruction(s) or Response(s)

Practice Tips

- Inquire:
 - Reason(s) for Disposition of Property
 - Reason(s) for Other Instructions
 - Need(s) of Recipient
 - Independent Corroboration

- Observe:
 - Role of Person(s) in Position of Trust
 - Source of Damaging Information

- Listen:
 - Does the story add up?

- *In Terrorem Clauses*
- Revoking bequest or devise if Will challenged or contested

Burden of Proof

- Objectant Must Establish
- Preponderance of Evidence
- Even if Confidential Relationship

Questions?

Comments?

Contact Information

Steven B. Malech

Wiggin and Dana LLP – New York City

(o) (212) 551-2633

smalech@wiggin.com

Robert W. Benjamin

Wiggin & Dana, LLP – New York City

(o) (212) 551-2602

rbenjamin@wiggin.com

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